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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1005

NATIONAL ORGANIZATION OF WOMEN, INC., ET AL., PETITIONERS

v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., ET AL.

No. 75-1008

SIDNEY S. HARRIS, ET AL., PETITIONERS

v.

ALLEGHENY-LUDLUM INDUSTRIES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Harris Pet. App. 13a-119a)[1] is reported at 517 F. 2d 826. The district court's June 7, 1974, opinion (Harris Pet. App. 1a-12a) and order (NOW Pet. App. A30-A31)[2] are reported at 63 F.R.D. 1. A later opinion and order of the district court (Harris Pet. App. 120a-127a) are unreported.[3]

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1975. On November 4 and 6, 1975, Mr. Justice Powell extended the time for filing petitions for a writ of certiorari to and including January 15, 1976, and both petitions were filed that day. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in upholding the validity of a release provision, contained in a consent decree entered in settlement of a government suit to undo patterns and practices of employment discrimination, by which individual employees

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[1] "Harris Pet. App." refers to the appendix to the petition in No. 75-1008.

[2] "NOW Pet. App." refers to the appendix to the petition in No. 75-1005.

[3] On February 19, 1976, Mr. Justice Powell denied a motion to stay this and the previous orders.

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may, at their option, collect a back pay award if they choose to waive certain claims arising out of antecedent acts of discrimination.

2. Whether the court of appeals correctly concluded that there was no abuse of discretion in the district court's refusal to allow the National Organization for Women, Inc., to intervene for the purpose of challenging the court-approved consent decrees.

3. Whether the consent decrees should have been disapproved because they may not presently resolve all issues of sex discrimination within the steel industry.

STATEMENT

The Attorney General, on behalf of the Secretary of Labor, and the Equal Employment Opportunity Commission instituted this employment discrimination suit on April 12, 1974, in the United States District Court for the Northern District of Alabama, alleging that the defendants—nine major steel companies and the United Steelworkers of America, AFL-CIO—had engaged, nationwide, in discriminatory policies and practices that deprived the companies' minority and female employees of equal employment opportunities in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*, and Executive Order 11246. The complaint sought systemic injunctive and affirmative relief and compensatory monetary payments to individual victims of discrimination.

1. The lodging of this complaint with the district court, together with a proposed nationwide settle-

ment agreement in the form of two consent decrees, concluded more than six months of negotiations among the federal plaintiffs and the corporate and union defendants. On the next day, the complaint was formally filed, and the district judge signed and entered the decrees.[4]

Consent Decree I affects both the union and the companies (Harris Pet. App. 17a). It provides for extensive seniority and other reforms to remedy continuing effects of past discrimination and for affirmative action in the form of the establishment of goals and timetables for the admission of minority and female employees to trade and craft job categories in which they have been discriminatorily underrepresented (*ibid.*). The decree enjoins the defendants from discriminating on the basis of race, color, sex, or national origin in any aspect of employment and from failing or refusing fully to implement the equitable remedial measures provided for (*ibid.*). In addition, it establishes a back pay fund of more than $30 million from which all "affected employees" (as defined in paragraph 18(c) of the decree; FEP Manual 431:143) may be compensated (Harris Pet. App. 17a).

Specific provisions dealing with the allocation of this fund (FEP Manual 431:143-144) are designed "to provide the greatest amount of back pay * * * to those affected employees who have been most adversely affected by past employment practices and who have the greatest plant service" (*id.* at 144),

[4] The decrees are reproduced at FEP Manual 431:125-152.

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but in no event is an affected employee whose employment began prior to January 1, 1968, entitled to less than $250 (*id.* at 143). Paragraph 18 provides, in part, as follows (*id.* at 143, 144, 145):

> [I]n full compensation for all alleged injuries suffered by such persons by reason of any unlawful acts and practices within the scope of the complaint or this Decree, up to and including the date of the entry of this Decree, as well as any future claim of damages by reason of the continuance of the effects of such past discriminatory acts and practices, all of the parties have agreed * * *:
>
> * * * * *
>
> In order to receive such back pay, each affected employee shall be required to execute a release, in a form approved by the Audit and Review Committee,[5] of any claims against or liability of the Company, the Union [etc.] * * * resulting from any alleged violations based on race, color, sex * * * or national origin, occurring on or before the date of entry of this

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[5] Consent Decree I establishes an industry-wide Audit and Review Committee composed of representatives of the companies, the union, and the government, which is charged with the responsibility of overseeing compliance with the decree (Harris Pet. App. 18a-19a). Any matters that the members of this committee are unable to resolve may be brought to the district court, which retains jurisdiction for a minimum period of five years "for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this Decree" (*id.* at 19a; FEP Manual 431:146).

> Decree, of any equal employment opportunity laws, ordinances, regulations, or orders * * *. * * * Such release will also bar recovery of any damages suffered at any time after the date of entry of this Decree by reason of continued effects of any such discriminatory acts which occurred on or before the date of entry of this Decree.

Consent Decree II broadly enjoins the corporate defendants from discriminating in employment and directs them to undertake affirmative-action hiring and other goals and timetables for the admission of minorities and females to supervisory and other job categories from which they have been historically excluded, all in accordance with the provisions of an Agreement appended to the decree (FEP Manual 431:146-152). The district court retains jurisdiction for at least five years to monitor the implementation process (*id.* at 148).

Neither decree binds non-parties or precludes individual employees from filing or maintaining private suits for relief from employment discrimination (see FEP Manual 431:126, 147-148).

2. Between April 12, 1974, and May 17, 1974, various individuals and organizations moved to intervene for the purpose of challenging the back pay release provisions of the consent decrees (Harris Pet. App. 26a). The district court granted intervention as of right to 36 individuals. Three of the individuals were women appointed by NOW at the court's request and represented by NOW's attorney. They appeared

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on behalf of classes of former, present, and future female employees of the defendant companies (*id.* at 26a-27a & n. 11). The court denied intervention to NOW itself and to the other organizations (*id.* at 5a).

Emphasizing that the decrees' "resolution * * * of issues between the government and the defendants does not preclude additional—or even inconsistent—relief in favor of private parties in other litigation" (*id.* at 8a), the district court found "nothing illegal * * * [in] the consent decrees themselves, neither in the basic approach to settlement reflected therein, the way in which such were negotiated and entered, nor the manner in which such will be implemented" (*id.* at 10a). With respect to the back pay release provisions, the court concluded that "there can be a legal waiver of back-pay claims where, for valuable consideration, a release is signed knowingly and voluntarily, with adequate notice which gives the employee full possession of the facts" (*id.* at 12a).

3. The court of appeals affirmed. It held that NOW was properly denied intervention because, *inter alia*, (1) "this was not a proper case for intervention as of right by *any* private party or organization pursuant to Rule 24(a)(1) [of the Federal Rules of Civil Procedure]" (*id.* at 34a; emphasis in original); (2) NOW failed to make the requisite showing under Rule 24(a)(2) that entry of the decrees "may, as a practical matter, operate to impair or impede the protection of its interest," because "[n]either NOW nor any of its members is bound by

res judicata or estopped to the consent decrees" (*id.* at 39a) and because NOW's interests were, in any event, protected by the presence of "its nominees and counsel during these entire proceedings" (*id.* at 41a); and (3) there was no abuse of discretion, within the meaning of Rule 24(b), in the district court's determination that NOW's participation would delay the proceedings to the detriment of other, more important interests (*ibid.*).

On the merits,[6] the court of appeals rejected petitioners' several challenges to the back pay settlement release provisions of the consent decrees (see *id.* at 56a). The court held (*id.* at 57a):

> [An] employee may release not only claims for additional back pay, but also claims for other relief—including injunctive—provided the released claims arise from antecedent discriminatory events, acts, patterns, or practices, or the "continuing" or "future" effects thereof so long as such effects are causally rooted—in origin,

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[6] In reaching the merits, the court said (*id.* at 42a, n. 22):

> Although we have determined that intervention as of right under F.R. Civ.P. 24(a)(1) was not available to the private parties and groups who sought intervention in this case, some of whose applications were granted below on the assumption that § 706(f)(1) of Title VII conferred such right, we proceed nonetheless to consider the merits of the attacks lodged against the consent decrees by the remaining intervenors-appellants. We do so on the assumption that the district court, having concluded that certain parties ought to be granted intervention either by right or by permission, would have allowed those parties to intervene in any event under either 24(a)(2) or (b).

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> logic, and factual experience—in discriminatory acts or practices which antedate the execution of the release, and provided, of course, that the release is executed voluntarily and with adequate knowledge * * *.

The court construed the release provisions of Consent Decree I (FEP Manual 431:144-145) to mean that an employee executing a release in return for a compensatory monetary payment would waive (Harris Pet. App. 57a; emphasis in original):

> (1) *all claims* * * * asserting unlawful employment discrimination by the defendants * * * insofar as such claims are based on acts or practices, within the scope of the government's complaint or the consent decrees, which were completed on or before the date of the decrees' entry; and (2) claims for *damages* incurred *at any time* because of continued effects of complaint or decree-covered acts or practices which took place on or before the entry date of the consent decrees.

The court enumerated the rights which, in its view, would not or could not be waived by an employee executing a release, "because a waiver of these rights either does not follow from a fair reading of paragraph 18(g) * ** or else they are 'prospective' and employees may not waive them" (*id.* at 57a-58a):

> (1) The release will not bar an employee from suing in the future for additional *injunctive* relief if the reforms contemplated by the decrees do not eliminate continued effects which are causally grounded in past acts or practices

of discrimination. * * * [*Id.* at 58a; emphasis in original.]

(2) Any employee who feels aggrieved by the defendants' palpable disobedience of the terms of the decrees may sue, in effect, to enforce them. * * * [T]he defendants readily concede that an episode of nonadherence to the decrees may conceivably constitute a new violation of the law and give rise to a new cause of action under Title VII or other applicable law. Whether a particular instance of noncompliance may give rise to a new claim for damages, injunctive relief, or perhaps both or neither, will * * * depend on the circumstances. * * * [*Id.* at 59a]

(3) Clearly apart from compliance or noncompliance with the decrees, the release cannot preclude a suit for *any* form of appropriate relief for *subsequent* injuries caused by *future* acts or undertakings the effects of which are equivalent to the otherwise compromised, noncompensable effects of past discriminations covered by the complaint or the decrees. Thus, the defendants are responsible for their conduct * * *. If [they] engage in new discrimination * * * they will be fully liable for its provable effects and for provable economic losses caused thereby * * *. [*Id.* at 60a; emphasis in original.]

The court found the remainder of petitioners' arguments to be without merit.[7]

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[7] On remand, the district court granted the motions of the respondent companies and unions to amend Paragraph 18(g) of Consent Decree I to make explicit the understanding of the parties to the decree that execution of a waiver would release

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ARGUMENT

That the government may file suits to obtain broad relief from systemic employment discrimination is beyond dispute. That it may settle the suits it brings is equally plain. The court of appeals correctly characterized the settlement of which review is here sought as "one of those rare instances in which the government has, to its satisfaction, successfully negotiated a comprehensive voluntary accord" (Harris Pet. App. 46a).

1. Petitioners attack the back pay release provisions of Consent Decree I. But, as the court of appeals stated repeatedly (*e.g.*, Harris Pet. App. 19a, 23a, 40a & n. 21, 47a), the consent decrees do not bind individual employees unless they elect to be bound by signing releases and obtaining monetary compensation.[8]

Petitioners thus seek invalidation of provisions that cannot affect the companies' employees at all except by their own choice.[9] The relief sought would put

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all claims relating to pre-decree events, including claims for injunctive relief based on the continuing effects of such events (Harris Pet. App. 120a). The Harris petitioners have appealed this order to the court of appeals (Motion to Defer Consideration, pp. 1-3).

[8] On the other hand, "the injunctive relief provided by the consent decrees extends to all affected steelworkers, regardless whether they elect to accept the back pay and execute the releases" (Harris Pet. App. 48a).

[9] It is not alleged, nor could it be, that employees who execute releases will not do so "knowingly and voluntarily,

employees who do not intend to execute releases in no different position from the one they already occupy and would prevent employees who wish to sign releases from doing so. That relief is without meaning for the former group and, by definition, unwanted by the latter. Petitioners all but concede that their concerns are conjectural (Harris Pet. 11-12) or premature (Harris Motion to Defer Consideration).

In these circumstances, petitioners present no justiciable controversy. See *Warth* v. *Seldin*, 422 U.S. 490, 516; *International Longshoremen's & Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224.

The dominant theme of the Harris petitioners' attack on the back pay release provisions is that they require an unlawful waiver of prospective rights. It is not disputed that the releases do not require a waiver of the right to assert future claims based on

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with adequate notice which gives the employee full possession of the facts" (Harris Pet. App. 12a). Paragraphs 17 and 18 of Consent Decree I (FEP Manual 431:142-143, 145) "establish mandatory procedures for fully informing private parties of their rights * * * [and] insure that individual employees have the opportunity to make free, intelligent decisions whether to accept the back pay under the consent decrees" (Harris Pet. App. 23a-24a; see also *id.* at 81a). Of course, in assessing the effectiveness of particular releases in the future, the district court will have to determine whether, in each instance, the employee's waiver was knowing and voluntary. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 52 & n. 15.

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any new acts of discrimination that may occur after the entry of the decree. Petitioners argue, however, that there is no certainty that the reforms mandated by the consent decree will in fact eliminate all the effects of past discrimination, and that the possibility therefore exists that members of the affected class will continue, after the date of the decree, to suffer monetary loss as the result of discrimination that occurred before the entry of the decree. The right to recover for such possible continuing injury, they claim, is a prospective right that may not be waived.

There is nothing in law or reason to prevent a party from settling a claim for future damages resulting from a past wrong. *W.J. Perryman & Co.* v. *Penn Mutual Life Insurance Co.*, 324 F. 2d 791, 793 (C.A. 5). The releases here will not effect "a waiver in advance of a controversy" (*Wilko* v. *Swan*, 346 U.S. 427, 438). As the court of appeals correctly stated, "all the ingredients of controversy to be compromised under paragraph 18(g) have their operative and legally consequential origin in acts, patterns, and practices which were performed by the defendants up to and including [the date of the consent decrees]. Those operative ingredients are thus antecedent to any possible compromise, not prospective" (Harris Pet. App. 63a-64a).

Petitioners also argue that the releases would be unlawful insofar as they waive the party's future "right to sue for necessary injunctive relief if the seniority system is not fully reformed" (Harris Pet.

12). But that issue is not properly presented at the present stage of this case, because, under the court of appeals' interpretation of the decree, "[t]he release will not bar an employee from suing in the future for additional *injunctive* relief if the reforms contemplated by the decrees do not eliminate continued effects which are causally grounded in past acts or practices of discrimination" (Harris Pet. App. 58a; emphasis in original).

Although the district court has since amended the decree (in accordance with what it found to be the original intent of the parties) to provide that the releases will waive all claims, for injunctive as well as monetary relief, growing out of pre-decree discrimination (Harris Pet. App. 120a-122a, 126a), a challenge to the validity of that amendment is pending before the court of appeals on petitioners' appeal and petition for a writ of mandamus (see Harris Pet. 7; Motion to Defer Consideration, p. 2). The issue is not yet ripe for this Court's consideration.[10]

2. The court of appeals correctly concluded that the district court did not abuse its discretion in denying, without prejudice, NOW's motion to intervene.

Rule 24(a)(1) of the Federal Rules of Civil Procedure provides for intervention as of right "when a statute of the United States confers an unconditional right to intervene." There is no such applicable stat-

[10] There is no reason to defer consideration of the present petitions pending the Fifth Circuit's decision on the matters before it. Petitioners will be free to seek review by this Court of any judgment subsequently entered by the court of appeals.

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ute here. This is—as the court of appeals recognized (Harris Pet. App. 34a) and as NOW acknowledges (NOW Pet. 4)—a government "pattern or practice" suit under Section 707 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-6, not a suit by the Equal Employment Opportunity Commission as representative of specific complainants under Section 706. Section 707, unlike Section 706, contains no language regarding intervention by "persons aggrieved."

Nor should a right to private intervention be read into Section 707, for the statutory scheme clearly evidences a congressional intent to distinguish between the private interests at stake in Section 706 actions to redress particular employee grievances and the public interest in nondiscriminatory employment practices that is vindicated through Section 707. This Court has noted such a public-private distinction in various contexts. See, *e.g.*, *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539; *United States* v. *Raines*, 362 U.S. 17, 27; *United States* v. *Borden Co.*, 347 U.S. 514, 518. Where, as here, a government enforcement action in the public interest, under a statute that does not expressly advert to any private right of intervention, has resulted in a consent judgment not binding on private parties, no such right should be recognized. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689.

Relying upon *Trbovich* v. *United Mine Workers*, *supra*, NOW asserts the public-private dichotomy discussed above as support for a right to intervene on behalf of its members under Fed. R. Civ. P. 24

(a)(2) (NOW Pet. 6-8). There is support in *Trbovich* for the conclusion that, if NOW members employed by the corporate defendants had a legally cognizable stake in the settlement of this suit, their interest would be sufficiently distinct from that of the government to satisfy the "interest" requirement of Rule 24(a)(2). Thus if, assuming *arguendo* the existence of a constitutionally sufficient interest, those members had not been otherwise represented in the proceedings below, NOW might have had the necessary standing to assert their rights. *Warth* v. *Seldin*, *supra*, 422 U.S. at 511; *NAACP* v. *Alabama*, 357 U.S. 449, 458-459.

But the interests of NOW and its membership *were* represented, both by NOW's attorney and by three individual members selected by the organization at the district court's request (see pp. 6-7, *supra*). NOW does not demonstrate, or even allege, that that representation was inadequate. Therefore, it has not shown its entitlement to intervene under Rule 24(a)(2).

In granting limited intervention in *Trbovich*, *supra*, this Court noted that no other remedy was available to the applicant under the statute there at issue (404 U.S. at 531). By contrast, "persons aggrieved" by employment discrimination may obtain relief under Title VII through Section 706 of the Act.[11] In any

[11] Thus, NOW's assertion that "the decision of the Fifth Circuit herein could foreclose the ability of individuals affected by government-negotiated decrees to have an effective voice in the process of remedying employment discrimination" (NOW Pet. 8) is without merit. NOW is incorrect in its state-

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event, as a constitutional matter, NOW lacks representational standing to enter the case because, as we have shown (pp. 11-12, *supra*), the consent decrees threaten neither its members nor any other employee of the defendant companies with any harm. See *Warth* v. *Seldin*, *supra*, 422 U S. at 511, 516; *Sierra Club* v. *Morton*, 405 U.S. 727, 734-741. See also *United States* v. *SCRAP*, 412 U.S. 669, 688.

3. NOW asks this Court to review the decision below on the ground that the consent decrees do not presently resolve all issues of sex discrimination in the steel industry (NOW Pet. 8-12). But settlement "normally embodies a compromise" (*United States* v. *Armour & Co.*, 402 U.S. 673, 681), and nothing in Title VII or Executive Order 11246 requires the Attorney General, the EEOC, or the Secretary of Labor, in enforcement proceedings, to resolve every issue of employment discrimination that may exist or arise.

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ment (*id.* at n. 10) that the decrees require the government to "take the side of the discriminators in any * * * separate litigation." The decrees merely state that "[i]f a private individual seeks, in a separate action or proceeding, relief other than back pay which would add to or be inconsistent with the systemic relief incorporated in this Decree, the plaintiffs will undertake to advise the Court * * * that such relief in that action or proceeding is unwarranted" (FEP Manual 431:126, 148). The court of appeals correctly pointed out that "no forum court will be legally obliged to follow any government recommendation" (Harris Pet. App. 22a).

Here, of course, individuals potentially affected by the decrees have been allowed to intervene and voice their objections to the decrees.

Here, through negotiation and settlement, the government has succeeded in obtaining nationwide, comprehensive relief from employment discrimination in a major industry. In doing so, it has not impeded the rights of individual employees to seek other relief. At the same time, the relief obtained by the government is not limited to employees who agree to forgo those rights; it "extends to all affected steelworkers" (Harris Pet. App. 48a). Thus, the court of appeals was correct in concluding that the effect of the consent decrees "is to leave the individual grievant in a position no worse, but in fact better, than that occupied in the absence of the settlement" (*id.* at n. 26). In addition, the district court's express retention of jurisdiction (FEP Manual 431:146, 148) permits the entry of further relief as appropriate (see Harris Pet. App. 19a). Particularly in these circumstances, "[t]he decrees * * * are not made unlawful simply because they presently fail to deal with every conceivable allegation of discrimination in the steel industry" (Harris Pet. App. 117a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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